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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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March 3, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,[1]

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 4, 1968.

---

1. On January 1, 1969, the United Transportation Union, a merger of petitioner, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen, succeeded petitioner as the collective bargaining representative of the employees of the defendant engaged as firemen.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of Indiana, Hammond Division, is not reported but is printed in the Appendix hereto at pp. A 15 to A 22, *infra*.[1] The opinion of the Court of Appeals and dissenting opinion of Judge Otto Kerner is reported at 404 F. 2d 80. It is also reproduced in the Appendix hereto at pp. A 1 to A 14, *infra*.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 4, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Does a federal court, in a state with a full crew law, have jurisdiction under Section 2, Seventh, of the Railway Labor Act to enforce the National Diesel Agreement, requiring the use of a fireman, against a carrier's unilateral change in that agreement, where there has been an adjudication binding upon the parties by a district court and Court of Appeals that the National Diesel Agreement is in effect in full crew states, or is the dispute minor and therefore wholly within the jurisdiction of the National Railroad Adjustment Board?

STATUTE INVOLVED.

The Railway Labor Act, 45 U. S. C. §§ 151 *et seq.*, the relevant portions of which are set forth in the Appendix hereto at pp. A 23 to A 24, *infra*.

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1. References to the Appendix to this Petition are "A". References to the Appendices to Briefs in the Court of Appeals are "App.".

STATEMENT OF FACTS.

1. Preliminary Statement.

The complaint seeks to enjoin conduct of respondent-defendant adjudicated to be impermissible by a binding decision of another Court of Appeals, and to enforce the positive mandates of the Railway Labor Act, 45 U. S. C. §§ 151 *et seq.* (the "Act"). It alleges that the defendant (sometimes referred to as "EJ&E") unilaterally changed the working conditions of the employees represented by the plaintiff-petitioner ("BLF&E") without complying with the duties imposed upon it by § 2, Seventh and § 6 of the Act. The cause was heard on plaintiff's motion for preliminary injunction to require use of firemen until the processes of the Act are exhausted with reference to securing changes in rates of pay, rules or working conditions. The district court concluded that the dispute involved was a minor dispute over which federal courts have no jurisdiction and accordingly dismissed the complaint. The Court of Appeals for the Seventh Circuit affirmed, Judge Otto Kerner dissenting.

There is no dispute of facts. They are summarized below.

2. Controlling Facts.

The National Diesel Agreement of 1950 to which the defendant is a party, and the basic collective agreement of the parties contain work rules which require carriers and the defendant herein to use and employ firemen on substantially all diesel locomotives including the locomotives involved in the operations here in dispute. In addition, Indiana has had for many years a full-crew law requiring the use of firemen which law is still in effect. Burns Ind. Stat. Anno., §§ 55-1330, 55-1331.

In August, 1967, the United States Steel Company com-

pleted a new facility in the Gary Sheet & Tin Plate Works known as the 84-inch hot strip mill. When the mill was completed the defendant EJ&E (a subsidiary of U. S. Steel) commenced a new run on August 12, 1967 known as the 84-inch strip mill job.

It was necessary for the carrier to consider its collective agreements with the three labor organizations representing employees involved in these operations—the Brotherhood of Locomotive Engineers ("BLE"), the Brotherhood of Railroad Trainmen ("BRT"), and plaintiff. Different starting times, different relief points, different provisions for the annulment of assignments, and different manning requirements than those specified in the collective agreements with the organizations were required before the operations could be commenced in the manner contemplated by the defendant.

The agreements with the BLE and BRT were amended by negotiation, the defendant recognizing that it could not make the changes in the manning of this run without such agreements (Def. App. pp. 67-68).

The defendant did not communicate or negotiate with plaintiff concerning changes in its agreement requiring use of a fireman despite repeated requests for negotiation. The defendant operated without a fireman and refused to negotiate on the ground that there was nothing to discuss because the agreement between the parties and the National Diesel Agreement had been modified by the Award of Arbitration Board 282 (Memorandum of the District Court A 15).

3. Related Litigation.

The background of the events leading to the Award of Arbitration Board 282, established under Public Law 88-108 is summarized by this Court in *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U. S.

423, 430-432 (1966), holding that the Award did not supersede state full crew laws.[1]

Award 282 expired on March 30, 1966. Shortly before this date the parties instituted litigation, herein referred to as the *Bangor* case, in the United States District Court for the District of Columbia to determine the consequences of the expiration of the Award. *Bangor & A. R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, 253 F. Supp. 682 (D. D. C. 1966), *affirmed* in part and *reversed* in part, *sub nom., Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co.*, 385 F. 2d 581 (D. C. Cir. 1967), *cert. denied*, 389 U. S. 923 (1968). The issues in the *Bangor* case, insofar as they are relevant and controlling here, related to the impact of the Award in full-crew states. The carriers argued that upon the expiration of the Award and the *subsequent* repeal of a state full crew law, the carriers would then be empowered to place into effect in that state the work rules provided for in Award 282.

This argument was rejected by the district court in the *Bangor* case on May 5, 1966, 253 F. Supp. 682 at 686-7. The Court of Appeals in the *Bangor* case affirmed this hold-

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1. In *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Chicago, Rock Island & Pacific Railroad Co. et al.*, ... U. S. ....., 21 L. Ed. 2d 289 (1968), the Court held the Arkansas full crew law to be constitutional. Attacks on other full crew state laws were instituted in New York, Ohio, Wisconsin and Indiana. *New York Central R. Co.* v. *Lefkowitz*, 259 N. Y. S. 2d 76 (1965), aff'd 282 N. Y. S. 2d 68 (App. Div. 1967), aff'd 23 N. Y. 2d 1, 241 N. E. 2d 730 (1968), appeal dismissed, ... U. S. ....., 33 L. W. 3302 (Feb. 24, 1969); *Akron, Canton & Youngstown R.* v. *Public Utilities Commission of Ohio*, 224 N. E. 2d 169 (1967), affirmed, ... N. E. 2d ..... (Ohio Court of Appeals, November 19, 1968); *Chicago & North Western R. Co.* v. *LaFollette*, 27 Wis. 2d 505, 135 N. W. 2d 269 (1965); *Public Service Commission* v. *New York Central R. Co.*, 216 N. E. 2d 716 (Ind. Sup. Ct., 1966), cert. denied, 385 U. S. 843. The parties in the Indiana suit included both plaintiff and defendant here. The Indiana Supreme Court held the Indiana full crew law to be constitutional and not pre-empted by federal law. On the latter point it relied on this Court's decision in *Locomotive Engineers, supra*, 382 U. S. 423.

ing of the district court and held that the National Diesel Agreement continued in effect after the expiration date of Award 282 in full crew states unless the full crew law was repealed during the period of the award. See the discussion of that court at 385 F. 2d 581, 611, 612, set forth in Judge Kerner's dissent below (A 9-11). This Court denied *certiorari* on January 29, 1968, 389 U. S. 923, and a final judgment consistent with the opinion of the Court of Appeals was entered by the district court on May 29, 1968.[1]

The defendant concedes that the *Bangor* case is *res judicata*.

REASONS FOR GRANTING THE WRIT.

Preliminary Statement.

Five years of bitterly contested litigation in state and federal courts culminating in decisions favorable to plaintiff are wiped out by the decision below.[2] The decision below is patently wrong but cannot be brushed aside simply as an aberrant decision. It sets the pattern for denying justice by abuse of the familiar major-minor dichotomy. In an increasing number of cases, any contention, however unmeritorious, is seized upon as involving an interpretive issue which can only be resolved by the National Railroad Adjustment Board, a tribunal years behind in its docket and a launching pad for a new round of litigation. Unless the pattern is broken more litigation will be spawned. The end result will be a denial of justice.

Certiorari should be granted to break this pattern. It is warranted on the traditional ground of resolving con-

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1. For a description of the carrier's intensive but abortive efforts to overturn the decision on the full crew issue even after denial of *certiorari*, see Appendix to Reply Brief pp. 1-4.

2. See the *Bangor* case, *supra*, and cases cited n. 1, p. 5, *supra*.

flicts between courts of appeals, and to settle an important persistent issue of federal jurisdiction involving interpretation of the Railway Labor Act. It should be granted and the judgment below reversed *per curiam* for the reasons set forth in Judge Kerner's dissent.

1. *The decision below conflicts with a decision of this Court and of the Court of Appeals for the District of Columbia and ignores the res judicata effect of the latter decision.*

The controlling legal issue in this case is whether the award of Arbitration Board 282 modified the National Diesel Agreement in effect between the parties in Indiana, a full-crew state.

Defendant mounts its defense on the assumption that the National Diesel Agreement was so modified, and the rulings below accept this defense.

The crucial fact, ignored by the majority opinion of the court below, is that the issue was thoroughly litigated between the parties in the *Bangor* case, *supra,* and there was a clear and unequivocal ruling by the Court of Appeals for the District of Columbia that "the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law." 385 F. 2d 581 at 611. There was no need or right to inquire into the issue anew. This point is put in its proper perspective by Judge Kerner in his dissenting opinion. After noting that the carrier agrees that the decision in *Bangor* is *res judicata* between the parties, and setting forth the holding in *Bangor,* he states (A 11):

> "As it is conceded that the carrier's attack on Indiana's Full Crew Law * * * failed and the law was not repealed during the life of Award 282, then the 1950 National

> Diesel Agreement was and is in effect between these parties. This is due to the fact that the condition precedent for a change in that Agreement by Award 282, i.e., the repeal of the Full Crew Law, never came to pass."

Moreover, the decision below, by its holding that the carrier may have a basis for claiming that it can operate some runs without a fireman in a full crew state in disregard of the National Diesel Agreement where the full crew law was not repealed during the period of the award, is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Bangor*.

The ruling below is also in conflict with this Court's decision in *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U. S. 423 (1966), the rationale for the Court of Appeals decision in *Bangor*.

2. *The decision below presents an important issue of federal jurisdiction arising under the Railway Labor Act which should be resolved by the Court.*

The majority opinion of the court below holds that a federal court is without jurisdiction to enforce the collective agreement of the parties and the positive mandates of the Act. The opinion beats extensively the major-minor drums explicated in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711 (1945).

It winds up favoring the minor dirge and concludes accordingly that exclusive authority to decide the dispute rests in the National Railroad Adjustment Board.

The majority concludes that the dispute is minor because it

> "can be solved by the administrative interpretation of the *existing agreement in light of Award 282*. Although the holding of the District of Columbia Circuit Court

of Appeals in the *Bangor* case may control part of the instant dispute, the agreement must still be applied to the facts presented.[1] * * *

"1. *E.g.*, whether the switching operation in the instant case constitutes a 'run.'" [Emphasis supplied.] (A 5.)

This conclusion misconceives and misrepresents the *Bangor* opinion.

In *Bangor* the court held that Award 282 could not as a matter of law shed any light on the existing agreement since the award did not modify the Diesel Agreement in full crew states. No one disputes the requirement of the Diesel Agreement that there be a fireman on the job in question. The sole dispute is whether that agreement had been modified by Award 282. This question has been answered in the negative in the *Bangor* decision. As Judge Kerner said in dissent (A 8):

> "Neither an application nor an interpretation is required under the facts of this case. There is no dispute as to the facts so there is no reason for an application of any agreement. Since the only alleged dispute between the parties is over a decision of a Court of Appeals (as will be shown below), there is no necessity for interpreting any agreement."

The reference to the new run issue in *Bangor* by the lower court has no relevance in a full crew state such as Indiana.[1] In such a state, the National Diesel Agreement requires the use of a fireman on all runs—old or new. The majority opinion below states that the *Bangor* opinion "may control part of the dispute." By the device of separating the dispute into parts—part 1, the holding on full crew laws, and part 2, the holding on new runs—the

1. In non-full crew states the *Bangor* court held that as to new runs established after expiration of the award to which the provisions of the award could not have been applied during the period it was in effect, the "National Diesel Agreement and its requirement of a fireman on such engine crew" applied. 385 F. 2d at 611.

case is shelved as a minor dispute.[1] But this device, intended to create an issue of fact for an Adjustment Board, is synthetic. There are no parts to this underlying dispute. There is only one issue, and that is whether the National Diesel Agreement was modified by the Award in Indiana. That issue as we show in Part I hereof was adjudicated adversely to the defendant in a decision binding upon it.

The defendant recognized that it could not make the changes necessary to man the run to the 84" steel mill without negotiating changes in its agreements with the BLE and BRT (Def. App. 67-68). The only explanation offered as to why no agreement was made with the BLF&E was the carrier's opinion that the National Diesel Agreement was modified in Indiana by the Award (Def. App. 68). Judge Kerner was charitable in characterizing this opinion (A 13) as one not made "in good faith." His conclusion that "the carrier unilaterally changed the existing working conditions contained in the National Diesel Agreement in violation of the Railway Labor Act" is fully supported by the record.

The only relief sought by the complaint is for an injunction requiring the assignment of a fireman until the defendant has exhausted the processes of the Act with respect to changing rates of pay, rules or working conditions. Jurisdiction to grant such relief is firmly part of Railway Labor law.[2]

---

1. This holding by the lower court may be explained in part by its confusion as to the nature of the case before it. Its statement at A 5 "The nature of this controversy is such that the policy behind our entire system of railway labor law precludes the possibility of the use of a strike—with its consequent interference with interstate commerce—to settle the dispute" indicates that the court regarded the matter before it as a strike situation instead of an application by the union for an injunction to enforce the mandates of the Act.

2. *Virginian Railway Co.* v. *System Federation No. 30,* 300 U. S. 515, 549-553 (1937); *Texas & New Orleans R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 567-571 (1930);

In a recent case involving precisely the same issue as this case injunctive relief to enforce Section 2, Seventh of the Act was granted. *BLF&E* v. *Detroit, Toledo Shore Line Railroad Company,* 70 L. R. R. M. 2237 (N. D. Ohio, Dec. 13, 1968).

The majority opinion below should be repudiated by the Court for another reason of overriding importance. It is part of a growing pattern of judicial opinion designed to nullify or frustrate legitimate rights of labor unions by unwarranted use of the major-minor dichotomy. In strike situations the objective is to circumvent the limitations of the Norris-LaGuardia Act. In this case the plaintiff did not strike, although there was a right to do so.[1] Instead it sought judicial relief to which it was clearly entitled. How can the result in this case be explained to workingmen? It will not advance their respect for the courts to explain that the writer of the majority opinion in the course of oral argument referred to the case as a "featherbedding case."[2]

Manning v. *American Airlines Inc.,* 329 F. 2d 32 (C. A. 2, 1964) *cert. denied,* 379 U. S. 817; *United Industrial Workers & Seafarers, etc.* v. *Board of Trustees,* 351 F. 2d 183 (C. A. 5, 1965); *Railroad Yardmasters of America* v. *Pennsylvania Railroad,* 224 F. 2d 226 (C. A. 3, 1955); *Brotherhood of Locomotive Firemen and Enginemen* v. *Southern Railway Company,* 212 F. Supp. 465, 217 F. Supp. 58 (D. D. C., 1963), *affirmed* 337 F. 2d 127 (C. A. D. C., 1964).

1. *Brotherhood of Ry. & S. S. Clerks* v. *Florida East Coast Ry. Co.,* 384 U. S. 238 (1966), citing with approval *Florida East Coast Ry. Co.* v. *Brotherhood of R. R. Trainmen,* 336 F. 2d 172, 179-180 (5th Cir. 1964); *Butte, Anaconda & P. Ry.* v. *BLF&E,* 268 F. 2d 54 (C. A. 9, 1959), *cert. denied* 361 U. S. 864.

2. In *BLF&E* v. *Chicago, Rock Island & Pac. R. Co.,* ..... U. S. ....., 21 L. Ed. 2d 289, 296, this Court, in upholding the validity of the Arkansas full crew law, referred to the first finding of Arbitration Board 282:

> "1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work."

The time has come for this Court to discourage judges from following the philosophy of the Queen in *Alice in Wonderland*.[1]

> "The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."
>
> "It *must* come sometimes to 'jam today,' Alice objected."
>
> "No, it can't" said the Queen. "It's jam every *other day*: to-day isn't any *other* day, you know."

Carroll, *The Annotated Alice*, p. 247.

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1. In view of the large number of lower court decisions subsequent to *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R.*, 353 U. S. 30 (1957), many of which appear irreconcilable and are cited in the authorities referred to below, relating to major versus minor disputes in the context of the right to injunctive relief (by the carriers to enjoin strikes and, as here, by the unions to compel compliance with the Act), this Court should grant *certiorari* to review a concept so vital to the administration of the Act. We observe also that in *Rutland Ry. Corp.* v. *B. L. E.*, 307 F. 2d 21, 42 (2nd Cir. 1962), Mr. Justice (then Circuit Judge) Marshall stated in dissent that the major-minor dichotomy "is of such generality that it fails to pose the problems we must solve in any meaningful fashion." A leading labor law scholar, Benjamin Aaron, has stated that "the changing character of disputes arising under the Act has tended to destroy whatever useful distinctions were originally implied by the words 'major' and 'minor'" and the classification of such disputes in these terms has become "a sterile exercise in logomachy." Aaron, *The Labor Injunction Reappraised*, 14 Labor L. J. 41, 62, 63 (1963). The distinction is "illusive" and requires "clarity" by this Court. *Id.* at 58. Other commentators have also suggested the need for new guidelines by this Court. See, *e.g.*, Note, *Railway Labor Act—Major and Minor Disputes*, 31 J. of Air Law & C. 371, 376 (1965); Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 Tenn. L. Rev. 264, 274 (1965). The "major-minor" dichotomy has resulted in "incredible judicial contortions," "an incredible muddle," "casuistry" and "fumbling misclassifications of 'major disputes' into 'minor disputes' * * *" Kroner, *Interim Injunctive Relief Under the Railway Labor Act: Some Problems and Suggestions*, 18th Annual Conference on Labor, New York University (1966) 179, 183, 184, 188, 189.

CONCLUSION.

For the reasons herein set forth, and the plainly erroneous character of the holding below, this Court should issue a writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that court *per curiam*.

Respectfully submitted,

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March 3, 1969.

APPENDIX.

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

December 4, 1968.

(Reported at 404 F. 2d 80.)

Before CASTLE, *Chief Judge,* and HASTINGS and KERNER, *Circuit Judges.*

CASTLE, *Chief Judge.*

This case arose under the Railway Labor Act, 45 U. S. C. § 151 et seq., and concerns the obligation of the defendant railroad to employ firemen, members of the plaintiff brotherhood (BLF&E), on a switching locomotive which is operated for the railroad's parent company, United States Steel Company, within the latter's Gary, Indiana plant. The railroad claims that, pursuant to the collective bargaining agreement, as modified by Arbitration Award No. 282, issued pursuant to Public Law 88-108, 77 Stat. 132, it need not employ a fireman on the switching locomotive. The BLF&E, on the other hand, argues that the award did not modify the National Diesel Agreement or the collective bargaining agreement in "full crew" states such as Indiana.

The BLF&E relies heavily on the recent case of *Bangor & A. R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 253 F. Supp. 682 (D. D. C. 1966), affirmed in

part and reversed in part, sub nom, *Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co.*, 385 F. 2d 581 (D. C. Cir., 1967), cert. denied 390 U. S. 923, 88 S. Ct. 851, 19 L. Ed. 2d 983 (1968), to which both plaintiff and defendant in the instant case were parties. The court there dealt with the similar problem of whether Arbitration Award 282, which by its terms was to last two years, and had by then expired, permitted the railroads to continue using the procedures established by the award to abolish firemen's jobs. The district court in the instant case properly summarized the holding in *Bangor*:

> "There the Court of Appeals held, in essence, that the Arbitration Award was not part of the work rules or collective bargaining agreements between the parties, but rather, it had established a method, which terminated with the award, for changing these agreements. It held that those jobs abolished during the period of the award did not have to be reestablished but that the procedures of the award were no longer available to the railroads. It further held that 'any new runs created after Award 282 are subject to the National Diesel Agreement; and its requirement of a fireman on each engine crew. Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law'. The Supreme Court denied certiorari on January 29, 1968."

The district court dismissed the suit on the ground that it had no jurisdiction since the dispute before it was "minor" rather than "major" and therefore exclusively within the jurisdiction of the agency created by the Act. Since we agree with the district court that the dispute in the instant case is "minor," and therefore the federal courts are without jurisdiction, we find it unnecessary and inappropriate to consider the merits of the controversy,

namely, whether or not the agreement, as it now stands, permits the railroad to operate the switch locomotive without a fireman. Rather, we shall deal only with the determination that the instant dispute, within the meaning of the Act and the cases interpreting the Act, is "minor."

In this regard, a short look at the history of our national railway labor policy is necessary. In 1926, Congress first set up the machinery and the procedures which are embodied in the Railway Labor Act, in order to lessen the threat to interstate commerce posed by strikes in the railroad industry. The Act and the case law dealing with it recognize the basic difference between two classes of labor disputes: the so-called "major" and "minor" disputes.

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. * * *
>
> "In general, the difference is between what are regarded traditionally as the major and minor disputes of the railway labor world." *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 723, 65 S. Ct. 1282, 1290, 89 L. Ed. 1886 (1945).

The consequences of determining whether a dispute falls within one class or the other are quite significant and, in fact, determinative of the case before us. If a dispute is "major," it must be resolved under the procedures pre-

scribed by § 6 of the Act, 45 U. S. C. § 156, under which notice must be given, followed by negotiation, mediation by the National Mediation Board, voluntary arbitration, possible conciliation attempts by the President (by a Presidential Emergency Board), and finally, if no agreement can be reached, by self-help by the parties. "Minor" disputes, on the other hand, must first go to negotiation, and if that fails, then to binding arbitration by the National Railroad Adjustment Board (NRAB) or, alternatively, by a special Board of Adjustment.

The reason for the difference in treatment between the two types of disputes was the judgment of Congress that "minor" disputes were not of sufficient importance to justify a railroad strike with its consequent interruption of interstate commerce. Thus, a strike over a "minor" dispute can be enjoined to protect the jurisdiction of the NRAB, *Brotherhood of Railroad Trainmen* v. *Chicago R. & R. I. R. Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957), while a strike over a "major" dispute can not be enjoined. *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 80 S. Ct. 761, 4 L. Ed. 2d 774 (1960). Moreover, the statutory procedures are exclusive and "[t]he right of one party to place the [minor] dispute before the Adjustment Board, with or without the consent of the other, has been firmly established. * * * And the other party may not defeat this right by resorting to some other forum." *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U. S. 33, 38, 83 S. Ct. 1059, 1062, 10 L. Ed. 2d 172 (1963).

We come, then, to the instant case and the facts leading up to it. Congress passed Public Law 88-108 in order to prevent a threatened nation-wide railroad strike occasioned by the railroads' notice that they planned to eliminate firemen's jobs on freight and switching engines. Under the Law, Arbitration Board 282 was established and Arbitra-

tion Award 282 was issued, to be effective from January 25, 1964, through January 24, 1966. The effect of the award after its expiration was the subject of the *Bangor* litigation, previously discussed. The BLF&E, in the instant case, contends that *Bangor* is res judicata to the instant case.

However, both parties agree that if the dispute is "minor," the federal courts are without jurisdiction to grant any relief, whereas if the dispute is "major," any changes in the rules and working conditions embodied in the agreements between the parties must be enjoined until all statutory procedures are completed. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

We find that the reasoning of the cases discussed and the policy of the Railway Labor Act compel the conclusion that the instant dispute is "minor" and not "major." First, the present controversy can be solved by an administrative interpretation of the existing agreement in light of Award 282. Although the holding of the District of Columbia Circuit Court of Appeals in the *Bangor* case may control part of the instant dispute, the agreement must still be applied to the facts presented.[1] Second, neither the BLF&E nor the railroad is seeking a new agreement; rather, they are each asserting rights under the present agreement as each party interprets it. Third, the nature of this controversy is such that the policy behind our entire system of railway labor law precludes the possibility of the use of a strike—with its consequent interference with interstate commerce—to settle the dispute. Rather than seeking a change in the present rights of the parties, the railroad here is demanding, in good faith, only what it believes its rights are under the terms which have been previously bargained for or arbitrated.

1. E.g., whether the switching operation in the instant case constitutes a "run."

In short, this is not a situation where "there is no such agreement or where it is sought to change the terms of one"; rather, this case involves the issue of "whether an existing agreement controls the controversy." *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U. S. 711, 723, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945). As such, the dispute is "minor" and the federal courts are without jurisdiction to hear the case. The order dismissing the case for lack of jurisdiction is therefore affirmed.

AFFIRMED.

KERNER, *Circuit Judge* (dissenting).

I regret that for the first time I must respectfully dissent from a decision by my brethren.

The national labor policy for railroads is one which seeks to encourage industrial peace by substituting arbitration for strikes in minor disputes. The genesis of the policy is in the wise decision of the Congress that the continued operation of the nation's railroads is vital to a healthy economy and, therefore, that strikes over interpretations of existing agreements should be avoided. *Bhd of R. R. Trainmen* v. *Chicago River & I. R. Co.,* 353 U. S. 30, 35-41, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957).

Conversely, Congress also recognized in Section 8 of the Norris-LaGuardia Act (29 U. S. C. § 108) that unions should have a right to strike when necessary to secure the rights of their members or to improve their lot. Thus, while the Supreme Court has upheld the issuance of injunctions against strikes in minor disputes, it has refused to uphold them in major disputes. *Bhd. of R. R. Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U. S. 50, 66, 64 S. Ct. 413, 88 L. Ed. 534 (1944); *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U. S. 711, 725-727, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945); *Chicago River, supra,* at 42, 77 S. Ct. 635; *Order of R. R. Telegraphers* v. *Chicago & N. W. Ry. Co.,* 362 U. S. 330, 341,

80 S. Ct. 761, 4 L. Ed. 2d 744 (1960); *Bhd. of Locomotive Engrs.* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 288-289, 83 S. Ct. 691, 9 L. Ed. 2d 759 (1963); and *Bhd. of Ry. & SS. Clerks* v. *Florida East Coast Ry. Co.*, 384 U. S. 238, 243-244, 86 S. Ct. 1420, 16 L. Ed. 2d 501 (1966). The latest case cited also recognizes that carriers may resort to self-help in major disputes.

Because of the differences in rights and procedures, the distinction between major and minor disputes is of crucial importance. In *Elgin, J. & E. Ry. Co.* v. *Burley*, the court noted that the Railway Labor Act distinguishes the two types of disputes in Section 2 (45 U. S. C. § 152). The court held, 325 U. S. at 722-723, 65 S. Ct. at 1289:

> The statute first marks the distinction in section 2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. * * * [Notes omitted.]

Thus, a minor dispute is one which necessarily requires an actual application or interpretation of an existing agreement and set of facts for its resolution. An "application" of the agreement means that the facts create an issue as to whether or not the agreement controls the resolution of a highly particularized dispute. An "interpretation" of the agreement means that an issue exists as to the meaning of the agreement.

Neither an application nor an interpretation is required under the facts of this case. There is no dispute as to the facts so there is no reason for an application of any agreement. Since the only alleged dispute between the parties is over a decision of a Court of Appeals (as will be shown below), there is no necessity for interpreting any agreement.

In the *Chicago River* case, the Court also noted the distinction between Sections 2, Sixth, and 2, Seventh, characterizing the latter as applicable to a major dispute. *Supra* at 33. Section 2, Seventh (45 U. S. C. § 152, Seventh) pro-

hibits a carrier from unilaterally changing "the rates of pay, rules or working conditions of its employees, as a class" except in accordance with the bargaining procedures in the Act or those in agreements between the parties. In the *Florida East Coast* case, the Court cited with approval the holding in *Florida East Coast Ry. Co.* v. *Bhd. of R. R. Trainmen,* 336 F. 2d 172, 179-180 (5th Cir. 1964), cert. denied, 379 U. S. 990, 85 S. Ct. 703, 13 L. Ed. 2d 611, that unilateral changes in working conditions may constitute a major dispute where they amount to an abrogation of the existing agreement. 384 U. S. at 242, 86 S. Ct. 1420.

In the instant case, the carrier unilaterally instituted an important change in the agreement in force by refusing to use a fireman on the newly created "84 inch Hot Strip Mill run." It is not necessary for a party to seek a new agreement for there to be a major dispute. It is sufficient for there to be a unilateral change in the prior agreement which, as here, has the effect of creating a new agreement.

The carrier here has argued that it is only acting in accord with the existing agreements. In this regard, it is important to note that the carrier agrees that the decisions in *Bhd. of R. R. Trainmen* v. *Akron & B. B. R. Co.,* 385 F.2d 581 (D. C. Cir. 1967), cert. denied, 390 U. S. 923, 88 S. Ct. 851, 19 L. Ed. 2d 983 (1968), are *res judicata* between these parties. The Supplemental Opinion of the Court of Appeals in that case, 385 F. 2d at 607, shows that the carrier's unilateral action was in violation of the Railway Labor Act and is not based on any existing agreement. In that opinion, it was held, 385 F. 2d at 611-612:

> *The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award.* The Award provided a procedure for modifications during the two-year life of the Award. We recognize

that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, *we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.*

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressely held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. See *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R. R.*, 382 U. S. 423, 86 S. Ct. 594, 15 L. Ed. 2d 501 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this, personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in *Rock Island, supra*, 382 U. S. at 433, 86 S. Ct. at 599:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5

> under Section II—Part B(1) and B(2). *But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award.* See Opinion of Neutral Members, quoted *supra,* 41 Lab. Arb. at 681. The Board's energy was not limited to "the dispute which was before it [Congress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period. [Emphasis added.]

As it is conceded that the carrier's attack on Indiana's Full Crew Law (Burns' Ind. Stat. Ann. §§ 55-1330 and 55-1331) failed and the law was not repealed during the life of Award 282, then the 1950 National Diesel Agreement was and is in effect between these parties. This is due to the fact that the condition precedent for a change in that Agreement by Award 282, i.e., the repeal of the Full Crew Law, never came to pass.

The carrier tries to quibble with the phrase "new runs" as used in the above-quoted portion of the *Akron* decision. The carrier would confuse this Court and have it believe that the word "run" is a word of art in the railroad industry. Firstly, it must be remembered that the word appears in an opinion of a Court of Appeals and not in a railroad agreement. Thus, the NRAB has no special competence to define its meaning.

Secondly, the word was used in a well-known meaning. Its sense is that given in Webster's New International Dictionary (2d Ed.) at 2185:

> run, n. * * * 7. The distance or extent of territory covered or to be covered, * * *, during a special course, time or operation; the ship's *run* was only 300 miles; * * *; an engineer's *run.*

The court in *Akron* was simply saying that when a new assignment[1] comes into being, the National Diesel Agreement would regulate the use of firemen.

Whether this applies to new assignments which are modifications of existing ones is not material here. As shown by carrier's agreement of August 9, 1967, with the Brotherhood of Locomotive Engineers, this was a completely new assignment for this carrier. That agreement states (Plaintiff's Appendix 8-9):

> To enable the Carrier to be competitive and handle certain intraplant work associated with the steel manufacturing process at the 84" Hot Strip Mill of the Gary Sheet & Tin Works, it is agreed:
>
> 1. An assignment known as the *"84" Hot Strip Mill" Assignment may be established* to perform intraplant work *not now performed by EJ&E crews:*
> 2. The work of this assignment will include the switching of Yard P, servicing the 84" Hot Strip Mill, and related intraplant switching *not now performed by EJ&E crews at the 84" Hot Strip Mill and at other new plants and facilities that may be added in the future* at the Gary Sheet & Tin Works.[2]

Moreover, in his testimony before the court below, James Shimeall, carrier's Labor Relations Counsel, admitted that the 84 inch Hot Strip Mill was first serviced by carrier

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1. The word "assignment" is virtually synonymous with the Webster definition of "run." "Assignment," in the railroad industry has attained the status of a word of art. Operating employees (engineers, firemen, brakemen, etc.) bid for their particular positions on the basis of seniority. The bids are solicited by way of a "bulletin" which describes the area or territory to be covered, the work to be performed (switching, road freight, passenger, etc.), the starting time and estimated completion time of the trip, the location for starting ("on duty") and completion ("tie-up") for each crew member, and the days on which the position will work. The "assignment" is defined by the bulletin description.

2. Emphasis added. It is also important to note that the word "establish" is used in the railroad industry only in connection with new assignments.

> * * * when the *new* plant went into operation. *It was a brand new facility, the first time it went into full operation.* [Defendant's Appendix 50. Emphasis added.]

Carrier's argument on the definition of "new" runs does not appear to me to have been made in good faith.

The last argument raised by carrier is that a stipulation it entered into with the Brotherhood here constituted an agreement as to new work rules under Award 282. The unrebutted testimony of Charles Mellen, the Brotherhood's General Chairman, showed that the stipulation was a temporary job-protection device for the benefit of firemen put out of work by the state court's decision in the carrier's challenge to Indiana's Full Crew Law. It provided alternate employment to firemen pending disposition of an appeal to the Indiana Supreme Court, which held against the carrier. Defendant's Appendix 19, 40. That the stipulation was not a permanent change is shown by further testimony of Shimeall in which he admitted that carrier's sole reliance was placed on its contention that Award 282 modified the National Diesel Agreement. At Defendant's Appendix 51, Shimeall stated:

> I then recall that the conversation came up that he thought we had to have firemen on here, and the conversation then went along the line—I advised him that we had gone through this before in regard to the hot cinder and hot metal runs whereby *it was the carrier's contention that our Diesel Agreement had been modified by Award 282,* and that they were fighting that battle or had a complaint against the Public Service Commission of Indiana, and *I advised him that if he or they won their case before the Commission, that, of course, we would have to have firemen—put firemen on these assignments.* [Emphasis added.]

Thus, this defense also does not appear to have been made in good faith.

For the foregoing reasons, I am unable to find any good faith defense on the part of the carrier which is based on any existing agreement. I believe that carrier unilaterally changed the existing working conditions contained in the National Diesel Agreement in violation of the Railway Labor Act. Accordingly, I would reverse the judgment below and remand for further proceedings.

MEMORANDUM OPINION OF THE DISTRICT COURT BELOW, PER GEORGE N. BEAMER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA.

March 11, 1968.

The plaintiff Brotherhood of Railway Firemen and Trainmen represents the firemen employed by the defendant Elgin, Joliet & Eastern Railway. During August of 1967, the defendant commenced a new run known as the 84 inch strip mill job. No firemen were assigned to this run and defendant did not communicate or negotiate with plaintiff concerning it. The defendant, instead, entered into agreements with the unions representing the engineers and switchmen providing for a reduced crew and other changes in the work rules applicable to the job.

Plaintiff repeatedly requested negotiations concerning the use of firemen on the run because it was, and is, plaintiff's position that the collective bargaining agreement between the parties (Pl. Ex. 5) and the 1950 Diesel Agreement (Pl. Ex. 6) required the use of firemen on all diesel engines with certain exceptions not applicable here. The defendant refused negotiations on the ground that there was nothing to discuss because, in its view, the collective bargaining agreement between the parties and the 1950 Diesel agreement had been modified and amended by the Award of Arbitration Board 282. Under the defendant's interpretation of this award, firemen were not required on new runs such as the one in dispute used in industrial switching.

The plaintiff then commenced this suit for injunctive relief and asked that the Railway be prohibited from operating the 84 inch strip mill run without a fireman until all statutory procedures for changes in work rules provided

by contract were complied with. Title 45 U. S. C. § 152 Seventh provides:

> No carrier, its officers, or agents shall change the rates of pay rules, or working conditions of its employees as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this Title.

Title 45 U. S. C. § 156 provides for notice, negotiation, and mediation before any changes in rules, or rates of pay, etc. may be changed as provided in Section 152 Seventh. There is no claim here that the defendant complied with these provisions. The defendant claims instead that they are inapplicable because it is not attempting to change the "rates of pay, rules or working conditions" embodied in any collective bargaining agreement. On the contrary, it claims that the existing agreements were modified by the Award of Arbitration Board 282 so as to allow them to operate this run without firemen.

The dispute between the parties is neither new nor unique. The railroads and firemen's unions have long argued over the need for firemen on freight and switching operations. Following the decision of the Supreme Court, in *Brotherhood of Locomotive Engineers, et al.* v. *Baltimore & Ohio R. R. Co.*, 372 U. S. 284 (1963) that the parties had exhausted all statutory procedures, the railroads served a statutory notice that they planned to abolish the firemen on freight and switching engines. The resulting dispute threatened to halt the nation's railroads, and caused Congress to pass Public Law 88-108 which established Arbitration Board 282. The Board issued what is known as Arbitration Award 282 (Def. Ex. 1) providing a procedure for the elimination of firemen from most runs. By its own terms, the award was to last two (2) years, but the parties agreed to a series of limited extensions. Finally, at the termination of the last extension, the union

claimed that the 1950 Diesel Agreement was in full force and effect and that firemen had to be restored on all diesel engines. The railroads contended that the Arbitration Award had become part of all agreements and that they could continue to use its procedures to abolish jobs. This dispute terminated in the case of *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostoock R. R. Co.*, and related cases, 65 LRRM 2229, 65 LRRM 2995, 66 LRRM 2268, in the United States District Court and the United States Circuit Court of Appeals for the District of Columbia (Copies of the various opinions in these cases were supplied to the Court in connection with defendant's motions to transfer or dismiss. Both the Court and the parties have relied on these cases during the course of the litigation). There the Court of Appeals held, in essence, that the Arbitration Award was not part of the work rules or collective bargaining agreements between the parties, but rather, it had established a method, which terminated with the award, for changing these agreements. It held that those jobs abolished during the period of the award did not have to be reestablished but that the procedures of the award were no longer available to the railroads. It further held that "any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew. Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law." The Supreme Court denied certiorari on January 29, 1968.

It is against this background that the Court must decide the present case. The parties agree that if this is a "minor" dispute within the meaning of the statute and the Court interpretations, this Court has no jurisdiction

to grant the relief asked. On the other hand, the parties also agree that if it is a "major" dispute, then the Court must enjoin any changes in the rules and working conditions embodied in the agreements between the parties, until all statutory procedures are completed. (See *Virginia R. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937).)

The Court has examined numerous cases in an effort to determine the difference between "major" and "minor" disputes but has discovered no simple talisman. In *Elgin, Joliet & Eastern* v. *Burley*, 325 U. S. 711, 722-23 (1945), involving the right of a union to settle individual claims for money damages on behalf of its members, the Supreme Court said:

> The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor disputes . . .
>
> The two sorts of disputes are sharply distinguished though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.
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> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

> In general the difference is between what are regarded traditionally as the major and minor disputes of the railway labor world. (Citations omitted.)

The Court then outlined the differences in treatment accorded the two types of disputes. A major dispute goes first to negotiation, then to mediation, then possibly to a Presidential Emergency Board, and finally to self help. The minor disputes also start with negotiation, but then go to the National Railway Adjustment Board or a special board for binding arbitration. In other cases, the Supreme Court has further delineated the distinction between the two types of dispute. In *Brotherhood of R. T.* v. *Chicago R. & R. I. R. C.*, 353 U. S. 30 (1957) it held that a dispute over individual grievances was a "minor dispute" and a strike could be enjoined to protect the jurisdiction of the NRAB. In *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960) the Court held that a dispute over a new provision in a contract was a "major dispute" and a strike could not be enjoined.

Finally, in *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U. S. 33, 10 L. ed. 2d 172, 176 (1963) involving a dispute over the interpretation of an award of the Railroad Adjustment Board, the Court said:

> The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the dispute before the Adjustment Board, with or without the consent of the other has been firmly established. * * * And the other party may not defeat this right by resorting to some other forum. * * *. (Citations omitted.)

In addition to the Supreme Court cases already discussed, this Court has examined numerous cases from the Circuit Courts of Appeal. From these decisions, certain basic prin-

ciples may be discerned. A dispute over an individual employee's rights under a collective bargaining agreement is a minor dispute, and a court may enjoin a strike but cannot determine the basic issue. *Loco. Engineers* v. *Louisville & N. R. Co.*, 375 U. S. 33, 10 L. ed. 172 (1963); *Brotherhood of Railway Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30; L. ed. 2d 622 (1957); *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 87 L. ed. 1886 (1945). Disputes over an attempt to make an express change in a collective bargaining agreement are major disputes and the Court may enjoin such a change unless statutory procedures are followed. *Florida E. C. Ry. Co.* v. *Brotherhood of R. Trainmen*, 363 F. 2d 172 (5th Cir. 1964); *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, etc.*, 337 F. 2d 127 (D. C. Cir. 1964). Strikes over such disputes cannot be enjoined. *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 4 L. ed. 2d 774 (1960). Disputes over the interpretation of contracts, even though the interpretation might have major effects, are minor disputes and the Courts have no right or power to interpret the contract or enjoin the effect of either side's interpretation. *St. Louis S. F. & T. Ry. Co.* v. *Railroad Yardmasters of America*, 328 F. 2d 749 (5th Cir. 1964); *Missouri-Kansas-Texas R. Co.* v. *Brotherhood of Locomotive Engineers*, 266 F. 2d 335 (5th Cir. 1959). Finally, disputes over a local issue which does not involve an attempt to change the collective bargaining agreement are minor disputes. *Illinois Central R. Co.* v. *Brotherhood of Loco. Fire & Eng.*, 322 F. 2d 850 (7th Cir. 1954).

Two very recent cases, one from this Circuit, are most helpful. In *Brotherhood of Loco. Fire & Eng.* v. *Chicago & Illinois M. Ry. Co.*, 386 F. 2d 229 (7th Cir. 1967) the factual situation was much like that facing this Court. The plaintiff brotherhood brought the action for a declaratory judgment that the collective bargaining agreement and a

decision of a special adjustment board compelled the reinstatement of a certain run and for an injunction compelling the railroad to reinstitute the run. The Railroad contended that Arbitration Award 282 had modified the agreement, particularly Section 6(o) thereof, and it was free to drop the run. The union claimed that this was a major dispute because there was no genuine dispute over the meaning of the contract, the meaning having been determined by the arbitration award. The Court said, at 386 F. 2d 229:

> We think the affidavits reveal that no genuine issue of fact existed between the parties as to whether there was a dispute about the proper interpretation of Section 6(o) of the bargaining agreement in light of Award No. 282. It follows that we think the district court did not err in entering summary judgment dismissing the Brotherhood's suit for lack of jurisdiction over a dispute such as this which is particularly appropriate for settlement by the parties themselves or by the administrative agency set up for the purpose by the Railway Labor Act.

Likewise, in *Southern Railway Company* v. *Brotherhood of Locomotive Firemen & Enginemen,* ..... F. 2d ..... (D. C. Cir. Civil Action No. 1169-67, 1968) the Court said:

> (W)here the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a "major" dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements.

This Court has carefully considered the contentions of the parties and the effect of the District of Columbia litigation on the questions before it. It finds that the Railroad has made a good faith claim to a defense based on the collective bargaining agreements as modified by Arbitration Award 282. Certainly at the time this litigation was

commenced and the strip mill run began, the Railroad had such a good faith claim. At that time it was involved in protracted litigation with the plaintiff over many of the very questions before this Court. Even when the case was taken under advisement, the Railroad's petition for certiorari was still before the Supreme Court. Now, with that litigation concluded, the railroad has other claims, apparently made in good faith, which would allow it to operate this run without firemen and without changing work rules established by the collective bargaining agreements and arbitration award. One such claim is its contention that this is not a "new run" within the meaning of the Circuit Court of Appeals decision in the District of Columbia. The Court, therefore, finds that this is a minor dispute within the meaning of the statute and case law, and that it is without jurisdiction to grant the relief sought.

There is some support for the proposition that even in minor disputes, the Court may take jurisdiction of the case and use its injunctive powers to protect the jurisdiction of the adjustment boards. Here, however, there is no complaint before any adjustment board, and therefore, no basis for the court retaining jurisdiction of the case. *Manion* v. *Kansas City Terminal Ry.*, 353 U. S. 927 (1957) (per curiam); *Southern Ry. Co.* v. *Locomotive Firemen & Enginemen*, ... F. 2d ..... (D. C. Cir. Civil Action No. 1169-67, (1968)) (per curiam); *Westchester Lodge 2188 etc.* v. *Railway Express Agency, Inc.*, 329 F. 2d 748 (2nd Cir. 1964); *Hilbert* v. *Pennsylvania R. R.*, 290 F. 2d 881 (7th Cir. 1961), Cert. denied 368 U. S. 900 (1961).

The case is dismissed for lack of jurisdiction.

STATUTES INVOLVED.

Railway Labor Act, §§ 2, First, Seventh, 3 First (i) and 6; 45 U. S. C. §§ 152, First, Seventh, 153, First (i) and 156:

Section 2, First, of the Railway Labor Act.

"First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U. S. C. § 152, First.

Section 2, Seventh, of the Railway Labor Act.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." 45 U. S. C. § 152, Seventh.

Section 3, First (i) of the Railway Labor Act.

"There is hereby established, a Board to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but

failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U. S. C. § 153, First (i).

Section 6 of the Railway Labor Act.

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 1101

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

QUESTION PRESENTED

Is a dispute between a railroad and a labor organization as to the meaning and application of collective bargaining agreements in force and effect under the Railway Labor Act properly referrable to an administrative agency under that Act?

STATEMENT OF THE CASE

This action was commenced in October, 1967, by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) for the purpose of securing an injunction which would require the Elgin, Joliet and Eastern Railway Company (EJ&E) to employ and assign firemen to a plant switching locomotive which the EJ&E was operating within the confines of a United States Steel Corporation plant at Gary, Indiana. As grounds for the requested injunction, the BLF&E's complaint asserted that its collective bargaining agreements with EJ&E required the use of firemen on all locomotives operated by EJ&E and that EJ&E had violated the Railway Labor Act in that EJ&E was operating the plant switching locomotive without negotiating a change in the collective bargaining agreements.

In response to the complaint, EJ&E contemporaneously filed both an answer and a motion. The motion, in the alternative, sought to have the District Court (1) dismiss the action on the ground that the final judgment of the United States District Court for the District of Columbia in *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 253 F.Supp. 682 was technically *res judicata* between the parties; (2) transfer the cause to the United States District Court for the District of Columbia; or (3) stay the proceedings pending disposition of the appeal then pending from the final judgment of the District Court in *Bangor and Aroostook.* EJ&E's answer admitted that it was operating the locomotive in question as well as other plant switching locomotives without firemen and asserted that its practice was in full compliance with the collective bargaining agreements in force and effect between the parties as those agreements had been modified by the Award of Arbitra-

tion Board 282, the Arbitration Board which had been created by Public Law 88-108. The answer also alleged that the dispute between the parties was properly referable to, and within the exclusive jurisdiction of, an administrative body under the provisions of either the Railway Labor Act or Public Law 88-108.

The District Court, after denying EJ&E's alternative motions, proceeded to consider the BLF&E's motion for preliminary injunction. At the hearing on this motion, it was established that the so-called National Diesel Agreement and other collective bargaining agreements which required the EJ&E to assign firemen to all locomotives operated by it were modified by the Award of Arbitration Board 282, which Award was issued pursuant to Public Law 88-108. This Award took effect on March 30, 1964 and by its terms was "to continue in force for two years from the date it takes effect, unless the parties agree otherwise." This provision of the Award was sanctioned by Section 4 of Public Law 88-108.

Acting pursuant to the Award, EJ&E then designated all of the locomotive assignments which it operated as assignments which in its opinion could be safely operated without firemen. The BLF&E, pursuant to the Award, designated 10% of these assignments as "vetoed" assignments on which firemen must be assigned. EJ&E and other railroads operating in Indiana then sought to have that state's "full crew" law declared invalid in the Indiana state courts. After the state trial court issued an injunction against enforcement of the "full crew" law, the parties to that litigation, including the EJ&E and BLF&E, entered into a "stipulation" that provided that the EJ&E would continue to provide employment to all firemen then employed by EJ&E. (Def. App. p. 19)* This "stipula-

* Respondent's Appendix in the court below.

tion" remained in effect until the Indiana Supreme Court's order reversing the trial court injunction became effective on or about June 1, 1967. (Def. App. p. 40) Thus, some two months elapsed after the Award of Arbitration Board 282 expired on March 30, 1966 until the injunction against enforcement of the state "full crew" law was vacated. See, *Public Service Commission* v. *New York Central R. Co.*, 216 N.E.2d 716.

During the two year period of the Award, EJ&E eliminated firemen from a large number of the locomotives operated by it in the State of Indiana. It continued to operate these locomotives without firemen following the expiration of the Award until about June 1, 1966 when it put firemen back on many of the locomotives because of the Indiana Supreme Court's decision. (Def. App. 40) However, it did not put firemen back on certain locomotives working within the United States Steel Corporation's plant at Gary, Indiana.

Later, in August, 1967, following the completion by United States Steel Corporation of a new 84 inch hot strip mill, EJ&E began to perform plant switching services to that facility. The locomotive assigned to that service operated around the clock and no firemen were assigned thereto. While the BLF&E representatives protested the operation of this locomotive without firemen being assigned, BLF&E did not "repeatedly request negotiations" as the District Court stated in its Memorandum (A. p. A15). Rather, all of the evidence established that the BLF&E repeatedly refused any offers of negotiations on the ground that there was nothing to discuss. (Def. App. pp. 26, 38-9).

Finally, it was established at the hearing that BLF&E had not presented any grievances to EJ&E on behalf of

the BLF&E or individual firemen and no proceeding was pending before any administrative body respecting any alleged violation of collective bargaining agreements. (Def. App. p. 71; A. p. A22).

The District Court dismissed the cause for lack of jurisdiction on the ground that the dispute between the parties was a "minor" dispute rather than a "major" dispute under the Railway Labor Act and the authority of this Court's decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U.S. 711 (1945). The court also relied on *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville R. Co.,* 373 U.S. 33 (1963).

On appeal, the Court of Appeals affirmed, holding that the dispute between the parties was a "minor" dispute which could be resolved by an administrative interpretation of the previously bargained for or arbitrated agreements between the parties.

ARGUMENT

I.

The real controversy between the parties to this action is a simple dispute about whether or not the collective bargaining agreements respecting rates of pay, rules and working conditions currently in effect between the EJ&E and the BLF&E require the use of firemen on a locomotive performing an industrial switching service at the 84 inch hot strip mill of United States Steel Corporation at Gary, Indiana. The EJ&E takes the position that these collective bargaining agreements do not require the use of firemen on the assignment. The BLF&E, of course, takes the contrary position that the current agreements require the use of firemen.

Both the Court of Appeals and District Court recognized this controversy to be a "minor" dispute under this Court's decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley,* 325 U.S. 711 (1945), properly referable to an administrative agency for resolution as to the meaning and proper application of the existing collective bargaining agreement. They also noted that neither the BLF&E nor the EJ&E sought to change existing agreements and form a new agreement under the provisions of the Railway Labor Act—the classic "major" dispute in the railroad industry.

The decision of the court below is consistent with the following court of appeals decisions.

1. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago & Illinois Midland Ry. Co.,* 386 F. 2d 229 (7th Cir. 1968), where the BLF&E filed an action to require

the railroad to restore and continue to operate a yard switching engine because the collective bargaining agreements, about which the BLF&E alleged there was "no dispute," required such restoration and operation. The railroad answered that the agreement relied on by BLF&E was modified by the Award of Arbitration Board 282. The Seventh Circuit found that there was a genuine dispute between the parties as to the interpretation and application of the agreement as modified and held that exclusive jurisdiction rested in an administrative agency to resolve the dispute.

2. *Illinois Central R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 332 F. 2d 850 (7th Cir. 1964), where, in a dispute over transportation facilities at terminals, the court affirmed the issuance of an injunction against the BLF&E's strike on the ground that a "minor" dispute was involved because no written notice under Section 6 of the Railway Labor Act had been served to effect a change in the existing agreements.

3. *St. Louis, San Francisco & Texas Ry. Co.* v. *Railroad Yardmasters of America,* 328 F. 2d 749 (5th Cir. 1964). In that case, the railroad abolished certain yardmaster positions, allegedly in accordance with the collective bargaining contracts. The court held the dispute to be "minor" and subject to the exclusive jurisdiction of the administrative body set up under Section 3 of the Railway Labor Act.

4. *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 384 F. 2d 323 (D.C. Cir. 1967). The court there found that a dispute over whether the railroad was complying with the applicable collective bargaining agreements in failing to use firemen on certain locomotives was a "minor" dispute properly referable to

the adjustment board under Section 3 of the Railway Labor Act.

5. *Switchmen's Union* v. *Southern Pacific Co.*, 398 F. 2d 443 (9th Cir. 1968), where the court found that a dispute over the abolishment of a yardmaster's job was a "minor" dispute in view of the railroad's claim that its action was proper under the collective bargaining agreements and the union's claim that the action violated the agreements.

In suggesting that the decision below is contrary to the decisions in the litigation reported as *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 253 F. Supp. 682, remanded with directions, *sub nom. Brotherhood of Railroad Trainmen* v. *Akron & Baberton Belt R. Co.*, 385 F. 2d 581, cert. denied 389 U.S. 923, the BLF&E erroneously represents what transpired and what the courts held in that case.

The *Bangor* litigation commenced by the EJ&E and other carriers in Washington, D.C. was first of all an action for an injunction against the BLF&E to prevent an unlawful work stoppage. That injunction was obtained as part of the judgment of the district court which is set forth in Defendant's Appendix in the court below at pages 1-7. The action also constituted a review of the Award of Arbitration Board 282 in the light of Public Law 88-108. The district court judgment was, of course, the last final judgment in force and effect between the EJ&E and the BLF&E when the present action was commenced.[1]

---

[1] On the basis of that final judgment, EJ&E suggested that BLF&E's claim for relief presented in its complaint was res judicata. E.g. *Huron Holding Co.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *Turner* v. *Louisville & Nashville R. Co.*, 400 F.2d 572 (5th Cir. 1968) affirming 67 LRRM 2617.

What the Court of Appeals held in *Bangor* was that the "work rules" actually in effect on the last day of Award were the "work rules" which survived and which could be modified only by following the procedures of Section 6 of the Railway Labor Act. The Court ruled that where there was no dispute as to the size of an engine crew during the period of the Award—because a state full crew law "blocked" a railroad from reducing the size of the engine crew—the work rules actually in effect on the last day of the Award were contained in the National Diesel Agreement. But, this situation is not the instant case because in Indiana the EJ&E was not "blocked" from changing the size of engine crews on plant switching assignments[2] or on common carrier assignments.

In fact, there was a real dispute between the EJ&E and the BLF&E over the size of engine crews in that state during the period of the Award and the EJ&E eliminated firemen from locomotive assignments during that time in accordance with the Award and the "stipulation" which was in effect with the BLF&E. Because of the injunction against enforcement of the Indiana full crew law which prevailed during the period of the Award, the dispute between EJ&E and BLF&E as to the size of engine crews was broader and more encompassing than a dispute about the size of engine crews on plant switching locomotives. If the Indiana "full crew" act had been in effect during

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[2] The State of Indiana has never sought to apply the Indiana full crew law to EJ&E's plant switching locomotives since the law was enacted in 1937. A similar law was held inapplicable in Ohio, *Cooperative Legislative Com.* v. *Public Utilities Commission,* 80 N.E.2d 159.

the period of the Award, it is safe to assume that the only dispute between the EJ&E and the BLF&E would have been over the use of firemen on industrial switching locomotives. However, because the broader dispute existed and because EJ&E changed the size of engine crews and thus established a new "work rule" modifying the old National Diesel Agreement, the decision in *Bangor* is not inconsistent with the decision below.

This view of the Court of Appeals decision in *Bangor* finds support in a recent (February 28, 1969) decision in that same litigation, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R. Co.*, ... F. 2d ..... (No. 20,909, D.C. Cir. 1969), which is reprinted in the appendix hereto. This recent decision in *Bangor,* as well as the one reported at 385 F. 2d 581, are also consistent with the decision below in that both decisions contemplated and recognized the continuing use and need for administrative agencies charged with the function of interpretation of collective bargaining agreements in the event of disputes between the parties to them. The *Bangor* opinion reported at 385 F. 2d 581, specifically states at page 604 that it is proper for petitioner to bring forward for resolution by Arbitration Board 282 "questions of interpretation as to the scope and applicability of the Award". And the Court later stated in an unreported memorandum and order dated September 21, 1967:

> "This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40). [385 F. 2d at 604]
>
> "It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept

> the interpretation of the Board, would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15). [385 F. 2d at 612-3]" (Def. App. p. 13).

The same Court made the same determination in *Brotherhood of Railroad Trainmen* v. *Terminal Railway Association of St. Louis*, 380 F. 2d 584 (D.C. Cir. 1967).

The BLF&E does not suggest any grounds for its assertion that the decision below conflicts with *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966). That case held only that Public Law 88-108 and the Award did not pre-empt state laws relating to the manning of trains. It clearly does not stand for any proposition that Public Law 88-108 and the Award were not effective and could not operate with respect to locomotives and trains to which a "full crew" law was inapplicable.

II.

BLF&E suggests that this court should review the decision below as a vehicle for examining the validity of long established distinctions between "major" and "minor" disputes under the Railway Labor Act. This argument, we submit, is clearly addressed to the wrong forum for it was Congress which made the distinction between these types of railway labor disputes and not the courts. These statutory distinctions were explained in detail in this Court's landmark decision in *Elgin, Joliet and Eastern Railway Co.* v. *Burley*, 325 U.S. 711 (1945), but the distinction between them is set forth in Sections 2, 3 and 6 of the Railway Labor Act.

CONCLUSION

For the forgoing reasons, we respectfully suggest that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,909
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

BANGOR AND AROOSTOOK RAILROAD, et al.,
Appellees

No. 20,910
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, et al.,
Appellees

Appeals from the United States District Court
for the District of Columbia

Decided February 28, 1969

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard Isaac N. Groner* and *Alex Elson*, were on the brief, for appellant.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief, for appellees.

Before DANAHER,* BURGER and LEVENTHAL, *Circuit Judges.*

PER CURIAM: This case presents a particular facet of the issues relating to the manning of diesel locomotive crews with firemen. The background and general legal significance of Public Law 88-108 and of the expiration of Award of Arbitration Board 282 (Award) are set forth in our *Akron* opinion.[1] *Akron* involved appeals from the District Court's judgment of May 12, 1966, as to the firemen manning and crew consist rules in effect after the expiration of the Award. The instant appeals in the same consolidated cases relate to carrier actions that occurred after expiration of awards which were not before us in *Akron.*

Appellee Galveston Wharves (carrier) operates a single terminal or yard, located within one seniority district, which had five regularly assigned yard crews as of January 3, 1967. On that day this carrier posted a bulletin listing four firemen jobs which it proposed to abolish the next day. All of its crews had been listed during the period of the Award as crews on which, in the carrier's judgment, firemen were not needed, and one of them had been designated, in effect vetoed, by appellant Union, the BLFE. Ordinarily, under the principles set forth in *Akron,* this would plainly have established work rules, continuing in effect after expiration of the Award, as providing for a fireman only on the one vetoed crew, and the fact that firemen were actually retained in the positions on these crews until January 3, 1967, would be no bar to their subsequent separation.

The question arises because there were no "deadman controls" on the equipment as of the date of the expiration of the Award, and paragraph B(5) of the Award, which provided that the carrier was not required to use firemen

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* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

[1] Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R.R. Co., 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied,* 390 U.S. 923 (1968).

on listed crews (that were not counter-designated by the Union), contained a proviso—"provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition." The February 28, 1962, REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION, which found that only in rare situations was the use of a fireman necessary for safe operation of locomotives in freight or yard service, had recommended that no yard locomotive should be operated without a fireman unless and until equipped with a deadman control in good operating condition. The Opinion of the Neutral Members of Arbitration Board 282 refers to "installing a dead-man control in all yard engines which our award requires as a condition precedent to the operation of such locomotives without a fireman." *Railroads* v. *Operating Brotherhoods,* 41 Lab. Arb. 673, 687-99 (1963).

The carrier apparently ordered the deadman controls early in 1965, but because of delays in delivery and imperfections of equipment, the controls were not finally installed until December 1966, approximately nine months after expiration of the Award.

Although the District Court at first ruled favorably on the Union's application for an injunction to forestall the carrier from placing into effect its bulletin of January 3, 1967—in the light of its "affirmative acts" approach referred to in our *Akron* opinion—on reconsideration the District Court denied the relief sought, on the ground that the Union's position was contrary to a ruling of the Board 282 interpreting its Award. We find it unnecessary to refer to that ruling as such, as to the District Court's reasoning, because we think the principles set forth in our *Akron* opinion require affirmance of the judgment.

The Union also relies on our *Akron* opinion, and specifically on our ruling concerning the situation in states where full crew laws governed during the life of the Award. As to that we held that even though the elimina-

tion of the fireman positions listed by the carrier was blocked only because of the existence of that law, the subsequent repeal of the state law following expiration of the Award came too late for the carrier to terminate firemen involved, notwithstanding that during the lifetime of the Award the carrier had taken all the action available to it by listing the position for blanking.[2]

That ruling does not, however, apply to the issue before us. It was based on the principle that the existence of the state law meant that there was no present dispute then pending between the parties as to the size use of firemen, that the only dispute pending before Congress, and the only dispute as to which authority was delegated to the Board, was one that did not extend to crews in States which had full crew laws." *See BLFE* v. *Chicago, Rock I. & Pac. R.R.*, 382 U.S. 423, 433 (1966).[3] In short the existence of the state law limited the jurisdiction and authority of the Board.

The issue before us is not one where the Board's authority was thus limited. The decision whether to permit termination of the firemen positions was part of the dispute before the Board; the only question was whether, and under what conditions. Although the Award uses the punctuation of a proviso its meaning was simply this, that the work rule permissible under the Award was one providing that firemen would not be used when deadman controls were in working condition. Suppose deadman controls were in effect during the Award's lifetime and later became inoperative, either during the life of the Award or later. It would not be argued that the work rule discontinuing the fireman position was in effect on certain days (when the deadman controls were working) but not on

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[2] *See Akron, supra* n. 1, 128 U.S.App.D.C. at 89, 385 F.2d at 611-12.

[3] *See* 382 U.S. at 433: "Congress wanted to do as little as possible in solving the dispute which was before it, and we note this dispute was not over the size of crews in States which had full crew laws."

other days (when the controls were not working). We think the sounder construction is that the same work rule is in effect at all times, but the practical consequence of the work rule will vary in accordance with physical conditions, depending on the condition of the deadman control.

In our view the work rule in effect on the last day of the Award provided that the crews involved here were crews on which firemen were not required whenever the deadman controls were working; that work rule is still in effect; and it does not require a fireman on that crew even though the carrier had not removed the fireman by the end of the effective period of the Award.

The Union develops what it presents as unwelcome consequences of this view. The District Court also appears to have been concerned with the harsh consequences of the carrier's approach. We do not explore this matter, nor consider whether the scope of our ruling leaves open to the Union some minor dispute that could be pressed in an administrative forum. We have rather concerned ourselves with what we consider to be the fundamental legal question raised by the appeal. We conclude that the judgment should be

Affirmed.

SUPREME COURT, U. S.

FILED
MAY 22 1969
JOHN F.

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

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May 20, 1969.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1101.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF.

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1. **The issue presented.** The Statement of the Question presented in the Brief in Opposition (Def. Br., p. 1) obscures the basic issue in this case. The claimed dispute between the parties as to the meaning and application of a collective bargaining agreement is non-existent.

The controlling issue is whether a federal court has jurisdiction under Sec. 2, Seventh of the Railway Labor Act to ban a flouting of a collective bargaining agreement. Sec. 2, Seventh forbids changes in rates of pay, rules or working conditions except in the manner prescribed in Sec. 6. This Court has long held that injunctive relief lies to enforce Sec. 2, Seventh (See *Virginian* and the many other cases cited in n. 2, p. 10 of our Petition).

We ask now that this Court consider whether such relief lies for the flouting of a labor contract. Several Courts of Appeal have so ruled (*Manning,* Second Circuit, 1964; *United Industrial,* Fifth Circuit, 1965, and see the other cases cited in n. 2, pp. 10-11 of our Petition).

We feel justified to say the defendant flouted the agreement. The questions of the National Diesel Agreement, the Arbitration Award, the Full Crew Law, etc., were all litigated between the very parties now at bar and final judgment rendered. Thereafter the defendant refused to employ a fireman on a job assignment. Petitioner sought injunctive relief. Both courts below held that the dispute was "minor", thus relegating BLF&E to a tribunal where it will be required again to litigafe the very issues already litigated (and before a tribunal years behind in its docket) and to face another exhausting round of appeals.

2. **The claimed plant switching exemption.** The defendant recognizes the res judicata effect of *Bangor* (Def. Br., p. 8, Fn. 1, p. 9) that the National Diesel Agreement continues in effect after the expiration of the award in full crew law states. Having made this inescapable concession, the defendant lamely asserts, for the first time in this litigation, that the "State of Indiana has never sought to apply the Indiana full crew law to EJ&E's plant switching locomotives since the law was enacted in 1937" (Def. Br. p. 9, Fn. 2). This assertion is without a scintilla of support in the record. It is belied by the fact that the defendant found it necessary to make a collective agreement with the Brotherhood of Railroad Trainmen, to reduce the crew below the size specified in the Indiana Full Crew Law, with respect to the very assignment here in dispute. In a feeble effort to buttress its new contention, defendant cites *Cooperative Legislative Com.* v. *Public Utilities Commission,* 80 N. E. 2d 159 (Def. Br., p. 9). That case involved an interpretation of the Ohio Full Crew Law which con-

tained a specific exclusion of "private railroads not doing business as common carriers." No such exclusion exists in the Indiana Full Crew Law (Burns Ind. Stat. Anno., ¶ 55-1330, 55-1331).

3. **The deadman's controls case.** Defendant cites *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook R. Co.*, ... F. 2d ..... (No. 20,909, D. C. Cir., 1969) (Def. Br., p. 10), and reprints the decision in its Appendix. This most recent decision of the Court of Appeals reiterates the holding of that court that the National Diesel Agreement remains in force in states with full crew laws. But the holding in that case has no relevance here. The issue there was whether firemen could be removed from engines first equipped with dead man's controls after the award expired (The award required such controls as a condition of removal). The court held that the work rule established by the award was that firemen would not be required if engines were equipped with dead man's controls, and if a carrier puts dead man's controls on an engine after the award expires, the work rule authorizes the operation of the locomotive without the firemen.

4. **The alleged need for administrative interpretation.** The defendant quotes (Def. Br. 10) a portion of the *Bangor* decision which refers to the interpretive authority of Arbitration Board 282. Preceding this quotation, it makes the startling assertion that the *Bangor* court "recognized the continuing use and need for administrative agencies charged with the function of interpretation of collective bargaining agreements in the event of disputes between the parties to them" (Def. Br., p. 10).

This argument overlooks a key point: here there is no dispute over the meaning of a contract. The sole issue is whether the contract, in this case the National Diesel Agree-

ment, was modified in Indiana. The parties, including the defendant, could not and did not entrust that issue to an administrative agency. That issue they litigated in the courts. It was not until after the court ruled against the defendant and the other railroads on the basic issue that they made repeated efforts to secure in effect a reversal of the courts' decision on the full crew issue by securing an interpretation by Arbitration Board 282. The Board has declined to issue such interpretation.[1]

Defendant cites *Brotherhood of Railroad Trainmen* v. *Terminal Railway Assn. of St. Louis*, 380 F. 2d 584 (D. C. Cir., 1967), for the apparent purpose of indicating that the Court of Appeals intended Arbitration Board 282 to act as a continuing interpretive agency. This case does not support the defendant's position. That case holds simply that the Board may "determine the boundaries of rights, privileges and obligations of the parties *with respect to the two year period specified*" by the Public Law 88-108 and the award (p. 590). This it holds by reason of Public Law 88-108 which provides that Sections 7, 8 and 9 of the Railway Labor Act shall be applicable to Arbitration Board 282 (380 F. 2d 584 at 590) (Emphasis supplied).

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1. The last effort was a carrier telegram of April 17, 1968 to the National Mediation Board: "If the Board answers the questions in April 8th Tracy letter in manner we expect, we understand the United States Court of Appeals for the District of Columbia Circuit has power to recall its mandate in the *Bangor and Aroostook* case to consider the effect of those answers on its decision and the Supreme Court has power to reconsider its denial of certiorari." On June 29, 1968, Arbitration Board 282 was reconvened, declined to render any opinion, and stated "Insofar as these questions are not answered by the Award or by the Board's prior interpretations they pose issues relating to the effect of the Award on the National Diesel Agreement, which neither arose during the period of the Award nor concern its application during that period and which have been finally determined by the courts. We do not think that it would be consistent with the intent of Congress as expressed in Public Law 88-108 for us to take jurisdiction over these questions."

5. **Inapplicability of defendant's authorities.** The cases cited at pp. 6-8 of defendant's brief are clearly inapplicable. Defendant's reliance on these cases rests on the false assumption throughout its brief that the National Diesel Agreement was modified in Indiana. The assertion (Def. Br., p. 3) that at the hearing on plaintiff's motion for preliminary hearing it was established that the National Diesel Agreement was modified as to the EJ&E by the Award of Arbitration Board 282 is without support in the record. The District Court found merely that the Railroad had made a "good faith" claim to such a defense which under the theory of that court made the dispute "minor" and subject to resolution by the National Railroad Adjustment Board.

The finding at most was a conclusion of law, which in the light of the res judicata effect of *Bangor,* was erroneous.

Conclusion.

This case presents vital issues under the Railway Labor Act. It is another illustration of the manner in which the "minor dispute" label is pasted on a dispute thus foreclosing a union from *any* effective relief from wrongful carrier action. We ask that certiorari be granted and the judgment reversed *per curiam.*

Respectfully submitted,

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